

# Supreme Court of the United States,

I. R. HARKRADER, SHERIFF AND KEEPER OF WYTHE  
COUNTY JAIL, APPELLANT.

vs.

H. G. WADLEY, APPELLEE.

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CASE NO. 41, OCTOBER TERM, 1898.

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IN THE SUPREME COURT OF THE UNITED STATES :

I. R. Harkrader, sheriff and keeper  
of jail of Wythe county, Vir-  
ginia, Appellant.

vs.

H. G. Wadley, Appellee.

} Case No. 41.  
Dec. Term, 1898.

Petition for Certiorari, and rehearing of a judgment in above case entered 5th December, 1898, reversing judgment of the Circuit Court of United States for Western District of Virginia, Fourth Circuit of 18th August, 1896.

To the Honorable, the Judges of the Supreme Court of the United States.

The petition of H. G. Wadley, the Appellee in the above cause, would most respectfully represent to the court that, on December 5th, 1898, it ordered, adjudged and decreed, that the decree of the Circuit Court of the United States for the Western District of Virginia in the above cause, be reversed with costs, and that the same be remanded to the said Circuit Court, with

directions to restore the custody of your petitioner to the said sheriff of Wythe county, Virginia.

The petition for rehearing will deal with but one point involved in the determination of said cause by this Honorable Court.

In said opinion this Hon'l Court said :

Mr. Justice Shiras delivered the opinion of the court.

"The appellee has moved the dismissal of the appeal because, as is alleged, the order discharging the prisoner on the writ of habeas corpus was made by a judge, and not by a court, &c.

It is, indeed, true, as was decided in *Carper v. Fitzgerald*, 121 U. S. 87) that no appeal lies to this court from an order of a Circuit Judge of the United States, and not as a court, discharging the prisoner brought before him on a writ of habeas corpus. But this record disclosed that, while the original order was made at chambers, the final order, overruling the return of the sheriff and discharging the prisoner from custody, was the decision of the Circuit Court at a stated term, and therefore the case falls within *In re Palliser*, (136 U. S. 262)."

It is most respectfully submitted to the court that this court, on this vital point, was misled, by the purely clerical error of the clerk of the court below, who, by his own error, in copying the record, seemingly gave this court a jurisdiction that it did not possess. It will be seen from page 5 of the printed record, that on 11th August, 1896, petitioner presented his petition for a writ of habeas corpus, and that Chas. H. Simonton, Circuit Judge, awarded the writ and made it *returnable* "before me, Charles H. Simonton, Judge of our Circuit Court of the United States, within and for the said District afore-

said at *Greenville, South Carolina, on the 14th Aug. 1896.*

The writ was executed on 12th August, 1896, and the sheriff made his return on said 14th Aug. 1896, and, in obedience to said writ, on that day, produced the body of petitioner before "Charles H. Simonton, Circuit Judge," who on that day, made the order of final discharge, which on 15th Aug. 1898. (See page 12) he sent "to I. C. Fowler, clerk of this court at Abingdon, Virginia." The language of the order and its address to "I. C. Fowler, clerk of this court, at Abingdon, Va." imports that the Judge was not at Abingdon. Indeed, the habeas corpus proceedings, from the application for the writ to the order of final discharge, were in fact *vacation* or chambers proceedings, and that all of the orders were such.

For it has been discovered since the decision of this court in this case as will be seen from the affidavit of the deputy clerk of said court, Lindsey, here exhibited that the final order of discharge, appealed from, was in fact, entered by him as a vacation order and the order book on page 118, so shows, but that the said deputy clerk, in making the transcript of the record for this court, omitted to copy the portion of the entry on page 118 of the order book, that stated distinctly that the order was entered in vacation.

A correct copy of said entry on said page 118 of said order book, showing that the order of discharge was really entered, as a vacation order is herewith exhibited.

VACATION—August 15, 1896.

In the Circuit Court of the United States, for the Western District of Virginia. Fourth Circuit. In the

matter of the application of H. G. Wadley, for a writ of habeas corpus.

On this, the 14th day of August, 1896, came H. G. Wadley, the petitioner, by his counsel, Blair & Blair, and this cause coming on to be heard upon the petition for a writ of habeas corpus, and for order of discharge, with the exhibits filed with the said petition and said petition being duly verified by the affidavit of the petitioner, and upon the writ of habeas corpus issued on said petition on the 11th August, 1896, and duly executed upon I. R. Harkrader, sheriff of Wythe county, and as such, the jailer and warden of said county, in whose custody the petitioner is detained, and upon the return of the said sheriff to the said writ of habeas corpus, with the commitment filed therewith, as the authority under which he acts; upon the demurrer of petitioner to said return and joinder in said demurrer, and upon the answer and denial of the said petitioner, to said return; and upon the record in said case of H. G. Wadley versus Blount & Boynton, et al., and upon the production of the body of said H. G. Wadley, before this court, by the said sheriff, the said sheriff appearing in person, and also by counsel Attorney General of Virginia, and after argument of counsel, and the court being fully advised in the premises, the court finds that the said petitioner, H. G. Wadley, is unlawfully restrained of his liberty by the county court of Wythe county, Virginia, by virtue of an order of the Judge thereof, committing him to custody, in default of bail, entered on 10th August, 1896, on an indictment of the Commonwealth of Virginia, versus H. G. Wadley, on a complaint of felony set up in the petition, notwithstanding the injunction and writ of the court.

It is therefore considered and ordered by this court that the said H. G. Wadley be discharged from the custody of the said I. R. Harkrader, sheriff of Wythe

county, Va., and from the custody of said court, as said court cannot prosecute said indictment pending said injunction, and that the said H. G. Wadley hold himself subject to the further order of this court. And it is further ordered that the United States Marshal for the Western district of Virginia, serve a copy of this order upon I. R. Harkrader, sheriff of Wythe county, Va., and as such, the warden and jailer of said county, and also a copy thereof upon W. E. Fulton, Judge of said county, and Robert Sayers, Jr., Commonwealth's attorney for Wythe county, Virginia.

CHARLES H. SIMONTON,  
Circuit Judge.

15th Aug. 1896.

To I. C. Fowler, clerk of this court, at Abingdon, Virginia :

The Attorney General of Virginia, in his proper person, states that from this order the Commonwealth of Virginia desires to appeal.

CHARLES H. SIMONTON.

United States of America,

To W. S. White, deputy of I. R. Harkrader, sheriff of  
Wythe county, Va., Dr.  
1896, Aug. 14th.

To mileage for W. S. White, deputy sheriff of Wythe county, from Wytheville, Va., to Greenville, S. C., for self, 368 miles, at 10c. per mile,	\$36 80
Same for H. G. Wadley, prisoner,	36 80
Mileage for self on returning from Greenville, S. C., to Wytheville, Virginia, 368 miles, at 6c. per m.,	22 08

Attendance one day with prisoner before Judge  
Simonton,

2 00

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\$97 68

Approved—let it be paid by the Marshal of West  
Dist. of Virginia.

CHARLES H. SIMONTON,  
Circuit Judge.

15 Aug. 1896.

Rec'd, entered and filed,

I. C. FOWLER,  
Clerk.

Aug. 18, 1896.

Clerk's Office, U. S. Circuit Court,  
W. Dist. Va., Fourth Circuit  
at Abingdon.

The foregoing is a true copy from the Order Book  
in chancery of this court, on page 118-119, of Book No.  
2.

Witness my hand and the seal of the court, Dec. 31,  
1893.

. . . . .  
· United States Circuit Ct., ·  
· Western Dist. of Virginia. ·  
· . . . . .

The deputy clerk of said court, at Abingdon, Va.,  
when he made the transcript of the record for this court,  
in this case, in addition to the omission of the portion of  
the entry showing the order to be in vacation of his own  
will, made this caption to the transcript of the record on  
page 1, and which was no part of Judge Simonton's  
order. "At a circuit court of the United States, for the  
Western District of Virginia, continued and held at

Abingdon, Virginia, on Tuesday, the 18th day of Aug. A. D., 1896, present, the Honorable Charles H. Simonton, Circuit Judge." This caption was the act of the clerk, and not of Judge Simonton, and makes it appear that the final order of discharge was entered *in term* on 18th Aug. 1896. This is not true in fact, as is shown by the order book itself.

The expression "stated term," is not found in the printed record, and not in any entry of the final order in the court below.

Your petitioner respectfully submits that the record, as it was certified to your Honorable court, was incorrect and incomplete, as has since been discovered, and your petitioner, relying upon the clerk of said court, to do his duty in furnishing the appellant a correct copy of the record in this case, only discovered since the decision of this court in this case, on December 5th, 1898, the flagrant errors of omission and commission of the said clerk in making said transcript for this court.

But, petitioner submits that, as the said recital in the transcript on page 1, aforesaid, was, *by the error of the deputy clerk alone*, made to appear as a court order, no mere clerical error, in the recital in the transcript of the record and the omissions therefrom of the proper entry, will be allowed to convert a vacation and chambers order of a circuit judge into a court order at a stated term. That a clerical misprision may and will be corrected in this appellate court, is sustained by an abundance of authorities, with which it would be improper to burden this petition for rehearing. That the recital in the transcript of the record and the omission of the proper entry making it a court order, was the error and fault of the clerk, will be seen from the following affidavits of Hon. Chas. H. Simonton, the Circuit Judge, who made the

order, the deputy clerk at Abingdon, and of the deputy sheriff of I. R. Harkrader, who obeyed the writ and carried petitioner to Greenville, South Carolina, which said affidavits show beyond all doubt, the fact that the final order of discharge, was a vacation and chambers order, and not a court order, and that it was in fact entered as a vacation order and not a court order.

United States of America :

Office of United States Circuit Judge, Fourth Circuit, Charleston, South Carolina, December—, 1898.

I. R. Harkrader, Sheriff and Jailor of Wythe County, Virginia,	} On a petition for writ of habeas corpus by H. G. Wadley.
vs.	
H. G. Wadley.	

I, Chas. H. Simouton, Judge of the Circuit Court of the United States, Fourth Circuit, do hereby certify that on the 14th day of August, 1896, on an application of H. G. Wadley, for writ of habeas corpus, the sheriff of Wythe county, Virginia, in obedience to a writ issued by me for that purpose, brought and produced the body of the said H. G. Wadley before me at Greenville, South Carolina, where I was holding a term of the United States Court at that place, and that, in chambers and in vacation of the Circuit Court of the United States for the Western District of Virginia, at Abingdon, Fourth Circuit, I heard said application and entered the final order of discharge, on the 14th of August, 1896, and signed the said order as Circuit Judge on the 15th August, 1896, as a vacation order, made in chambers, and I sent said final order of discharge with the papers in the case to I. C. Fowler, Clerk of the United States Circuit Court at Abingdon, Virginia; that it was intended, and in fact was purely a vacation order, made in chambers, at Greenville, South Carolina, and I certify that I sent said order to said clerk I. C. Fowler, at Abingdon, and



I certify that all the proceedings in the matter of ex parte H. G. Wadley, on his petition for writ of habeas corpus, from the granting of the writ, to, and including the making and entry of the final order of discharge, were in chambers and in vacation of the said Circuit Court of the United States, for the Western District of Virginia, at Abingdon, Virginia.

Given under my hand, as Judge of the Circuit Court of the United States, for the Fourth Circuit.

CHARLES H. SIMONTON,  
Circuit Judge.

19 Dec., 1898.

In the Circuit Court of the United States, for the Western District of Virginia.

H. G. Wadley

vs.

I. R. Harkrader, Sheriff of Wythe county, Virginia.

In the matter of the application of H. G. Wadley, for a discharge on habeas corpus.

I, Stuart F. Lindsey, deputy clerk for I. C. Fowler, the clerk of the Circuit Court of the United States for the western district of Va., at Abingdon, Virginia, do certify that, as such deputy clerk, I made the entry of the original order of discharge of H. G. Wadley, by the Honorable Charles H. Simonton, Circuit Judge, in the above entitled case, in the order book of the above named court on the 18th day of August, 1896; that the order was an order of the said Judge in vacation and at chambers, at Charleston, South Carolina, and was sent to the clerk at Abingdon, by one of the attorneys in the case; that from an examination of the Order Book just made by me, I find that the order of discharge was entered in said book on page 118, and is entitled at the top of the page "Vacation;" that

through a clerical error in making the transcript of the record for the appeal, I inadvertently omitted to make the entry on said page 118 "Vacation;" that there was no term of the said Circuit Court of the United States for the western district of Virginia, held at Abingdon, Virginia, after the special term of said court, in July, 1896, until the next regular term thereof, in October, 1896; that Judge Charles H. Simonton was not present at any such court between the above dates; that the recital in the record in the case of I. R. Harkrader, Sheriff of Wythe county, Virginia, against H. G. Wadley, on an appeal from the Circuit Court of the United States from the western district of Va., on page 1 of said record, as follows :

"At a circuit court of the United States, for the western district of Virginia, continued and held at Abingdon, Virginia, on Tuesday, the 18th day of August, A. D., 1896.—Present : The Honorable Charles H. Simonton, Circuit Judge. Among others, were the following proceedings, to-wit :"

was put in the transcript of the record by me by mistake and does not state the correct facts, as I certify that no such court was held here, and that the said Judge Simonton was not present at any such court at Abingdon, Va., as states therein.

In making the record I used the "opening" above quoted,—(and in the record on page 1) simply the form suggested by the "Circuit Court of Appeals for the Fourth Circuit" in such matters, and failed to add the fact of being a "vacation order;" the words "continued and held at Abingdon, Va.," should have been omitted, and the fact of the order in vacation and at chambers at Charleston, S. C., and being entered in order book at Abingdon, Va., appear in stead.

STUART F. LINDSEY, D. C.

Sworn to before me, this the 23rd day of December, 1896, by Stuart F. Lindsey, deputy clerk for I. C. Fowler, the Clerk of the Circuit Court of the United States, for the western district of Virginia.

I. C. FOWLER,  
Clerk U. S. Circuit Court for the W. D. Va., at Abingdon, Fourth Circuit.

In the Circuit Court of the United States, for the Western District of Virginia, at Abingdon.

H. G. Wadley,  
vs.

I. R. Harkrader, sheriff of Wythe county, Virginia.

In the matter of the application of H. G. Wadley for a writ of habeas corpus.

I, W. S. White, deputy sheriff of I. R. Harkrader, sheriff of Wythe county, Virginia, being duly sworn, do say, that on the 13th of August, 1896, a writ of habeas corpus, issued by Charles H. Simonton, Circuit Judge, on the petition of H. G. Wadley, was executed by I. H. Buford, deputy United States Marshal on said sheriff, commanding him, to have the body of H. G. Wadley, before the said Circuit Judge at Greenville, S. C., on the 14th August, 1896, with the cause of his detention; that affiant in person took the said H. G. Wadley in custody according to the said writ, to the said Greenville, South Carolina, before the said Judge, where on the 14th of August, 1896, at said Greenville, the said Circuit Judge heard the case on said habeas corpus, and at that place, the said Judge on said 14th of August, 1896, discharged said H. G. Wadley from the custody of affiant, according to an order of discharge made there on that day by said Judge.

W. S. WHITE,  
D. S. for I. R. Harkrader, S. W. C.

Sworn to before me, this the 27th day of December, 1896, by W. S. White, deputy sheriff for I. R. Harkrader, sheriff of Wythe county

ROBERT W. BLAIR,  
Notary Public.

The question now involved in the application, is one of a *purely jurisdictional nature*; if the final order was an order of a court, this court has jurisdiction, but if the order was a vacation and chambers order of a circuit judge, then it has no jurisdiction. It is a universal rule that courts, including appellate courts, will hear parol evidence on jurisdictional questions.

Petitioner would show that on the 5th January, 1899, the mandate of this court will be certified down to the circuit court, unless it be arrested, and the judgment of this court of the 5th December, 1898, will be executed, wherefore the case should be retained in this court, and the clerk of this court directed to withhold the mandate until further proceedings can be had. It being manifest that the clerk of the circuit court certified to this court an inaccurate and erroneous transcript of the record, and, by his inadvertence and clerical error, has made it appear that this court had jurisdiction of this case, while, in fact, it had and has none, because the final order of discharge as entered, shows it to be a vacation order.

Therefore your petitioner asks leave under rule 30 of this court, to file the petition for rehearing, and that your honorable court will grant a rehearing of said judgment of 5th of December, 1898; that in the interim the court will not certify the mandate down to the circuit court; that you will award a writ of certiorari to the clerk of the said court, commanding him to certify and transmit to this court, a correct copy of the record in this case

as entered in the order book of said court, and correct copies of the orders made in said case by Hon. Chas. H. Simonton, Circuit Judge, and for such other, further and general relief as the nature of his case may require, and upon a rehearing of said judgment, the appeal be dismissed for want of jurisdiction.

And, as in duty bound, &c.

H. G. WADLEY.

Wytheville, Virginia, December 30th, 1898.

I, Frank S. Blair, an attorney duly licensed to practice in the Supreme court of the United States, do hereby certify that, in my opinion, the facts contained in the foregoing petition are true, and that the petition presents a case for a rehearing of the judgment complained of.

FRANK S. BLAIR.

Virginia.

Wythe county, to-wit :

I, R. W. Blair, a notary public, in and for the county and State aforesaid, do hereby certify that, John C. Blair, one of the attorneys for H. G. Wadley, personally appeared before me in my said county, and made oath that the facts contained in the foregoing petition are true.

JOHN C. BLAIR.

Sworn to before me, this 30th December, A. D., 1898.

R. W. BLAIR,  
Notary Public.